Supreme Court, U.S.
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No. 79-1231

In the Supreme Court of the United States

OCTOBER TERM, 1979

REN DAVID ELY, PETITIONER

v.

UNITED PARCEL SERVICE, INC. AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board, Member Murphy dissenting, held that United Parcel Service, Inc. ("the Company") violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by disciplining and ultimately discharging petitioner Ren David Ely, a truck driver, because of his action in filing grievances to vindicate the right conferred by the collective bargaining agreement between the Company and Teamsters Local Union 651 to take necessary restroom stops on the road, and his activities on behalf of the Professional Drivers Council ("PROD"). The Board rejected the Company's contention, which was accepted by the dissenting Board Member (Pet. App. 36a-40a), that Ely was discharged, not for these reasons, but because he had urinated in the truck while driving, thereby endangering his passenger's

safety. The Board ordered the Company, *inter alia*, to reinstate Ely with back pay. (Pet. App. 32a-35a, 23a-29a.)

2. The court of appeals denied enforcement of the Board's order on the ground that "the record when considered as a whole does not contain substantial evidence to support the Board's conclusion that respondent discharged Ely for his involvement in protected concerted activities" (Pet. App. 2a).

3. While the Board believes that the court of appeals erred in rejecting the Board's finding that Ely was discharged for his involvement in protected concerted and union activities, rather than for the good cause asserted by the Company, it did not file its own petition for certiorari because it viewed the disagreement between the Board and the court as presenting only an evidentiary issue, which this Court would not ordinarily review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner Ely seeks review on the ground that the court of appeals abused its reviewing function by merely entering a conclusionary order stating that the Board's findings were not supported by substantial evidence, rather than an opinion which explained the reasons for this conclusion. We recognize that in some circumstances a court of appeals' failure to explain adequately its reasons for reversing a lower tribunal can be grounds for vacating the court's judgment (see *Taylor* v. *McKeithen*, 407 U.S. 191 (1972)). We also believe that it would be better practice for the courts of appeals to set forth their reasons for concluding that the Board's findings lack

evidentiary support.[1] However, we do not believe that the failure of the court below to do so here presents an issue of sufficient importance to warrant review in this case.

Respectfully submitted.

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[1]See Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication And No-Citation Rules In The United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1173-1176, 1201-1204 (1978).

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